

St. Elizabeth Manor, Inc., Employer-Petitioner and Local 50, Service Employees International Union, AFL-CIO, CLC. Case 14-RM-700

September 30, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX,
LIEBMAN, HURTGEN, AND BRAME

On June 9, 1995, the Regional Director for Region 14 issued a Decision and Direction of Election in which he found that the successor Employer-Petitioner's voluntary recognition of the Union on January 23, 1995, does not constitute a bar to the instant petition because under extant law, recognition bar applies only in initial organizing situations, and not where recognition has been accorded by a successor employer. On June 28, 1995, the Union filed a timely request for review of the Regional Director's decision. The then Board majority¹ granted review on August 8, 1995, to consider the appropriateness of processing the petition under *Southern Moldings, Inc.*, 219 NLRB 119 (1975). Having carefully reviewed the entire record in this proceeding, we find that once a successor employer's obligation to recognize an incumbent union attaches, the union is entitled to a reasonable period of time for bargaining without challenge to its majority status, and we therefore overrule *Southern Moldings*.

I. FACTS

The Union was certified as the exclusive bargaining representative for service and maintenance employees at the predecessor employer and represented them for at least 5 years before the Employer-Petitioner purchased the company.

The Union and the predecessor were parties to a collective-bargaining agreement in effect from January 7, 1994, through January 7, 1997. On December 1, 1994, the Employer-Petitioner assumed operations without hiatus and retained a majority of the predecessor's 35 employees in the previously certified collective-bargaining unit. The Union requested recognition on December 6, 1994. The Employer-Petitioner granted recognition on January 23, 1995. The parties held three bargaining sessions, on February 21, March 7, and April 13, 1995, but did not agree to a contract. A fourth session scheduled for April 28, 1995, was canceled due to personal commitments of the Employer's attorney. On the day the fourth session was to have been held, the Employer-Petitioner filed the instant RM petition. The Union asserts that bargaining has continued.

II. ANALYSIS

Applying Board precedent under *Southern Moldings*, supra, the Regional Director found that the Employer-

Petitioner's voluntary recognition of the Union did not constitute a bar to the instant petition. The Regional Director rejected the Union's contention that its recognition should bar the instant petition and provide the Union with a reasonable period of time to negotiate a contract with Employer-Petitioner, a successor employer, free from any petitions.

A. Development of Board Precedent

In *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), an unfair labor practice case, the Board held that the lawful voluntary recognition of a union based on a demonstration of majority support entitles the union to a reasonable period of time for bargaining without a challenge being raised concerning the union's continued majority status, as it does in like situations involving certifications, Board orders, and settlement agreements. Subsequently, in *Sound Contractors*, 162 NLRB 364 (1966), the Board determined that a recognition bar should apply in representation cases where an employer extends recognition in good faith on the basis of a previously demonstrated showing of majority at a time when only that union was engaged in organizing the employees.² Thus, the Board held that no question concerning representation may be raised, and petitions seeking to challenge the recognized union's representational status are barred during a reasonable period of time following an employer's lawful recognition of a union. In *Josephine Furniture*, 172 NLRB 404, 405 (1968), the Board applied this principle in a case involving an employer (RM) petition.

In *Southern Moldings*, the Board created an exception to the general principle of *Sound Contractors* where a successor employer accords recognition to an incumbent union. The Board found at 219 NLRB 119 that, absent the successor's adopting the existing contract, the union has only a rebuttable presumption of continuing majority status. In such circumstances, the successor employer "in effect stands in the shoes of its predecessor vis-à-vis the union." The Board reasoned that "a union is not entitled to greater rights with respect to a successor than it had with a predecessor; and it may even have less since a successor is not required to accept a predecessor's union contract which would, had the predecessor continued the operation, have acted in the case of the latter party as a bar." The Board rejected the claim that the petition was barred under the *Keller Plastics* rule. 219 NLRB at 119-120. The Board concluded that *Keller Plastics* relates only to the initial organization of an employer's employees and does not apply when an alleged successor con-

¹ Chairman Gould, Members Browning and Truesdale; Members Cohen and Stephens dissenting.

² In *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), the Board modified *Sound Contractors* to provide that recognition of one union during simultaneous organizing campaigns would bar a petition by the rival union unless it demonstrated that it had a 30-percent showing of interest at the time of recognition. Chairman Gould, concurring in the result, would have imposed a recognition bar unless the rival's petition was filed prior to recognition.

tinues to accept an incumbent union as the representative of its employees.

The issue of whether a successor's recognition of an incumbent union constitutes a bar was not raised directly to the Board again until *Landmark International Trucks*, 257 NLRB 1375 (1981).³ At that time, the Board focused on the importance of effectuating its policies—implicitly referring to its policies of promoting stability in labor relations, protecting employees' rights to choose their representative, and encouraging the use of collective bargaining—by assuring the opportunity for continued bargaining following recognition. Moving away from its holding in *Southern Moldings*, the Board found that once an employer has voluntarily recognized a majority union, the employer must afford the union a reasonable time for bargaining prior to withdrawal of recognition or be found in violation of the Act. The Board stated that it could “discern no principle that would support distinguishing a successor employer's bargaining obligation based on voluntary recognition of a majority union from any other employer's duty to bargain for a reasonable period.” 257 NLRB at 1375 fn. 4.

On review, the Sixth Circuit, apparently concerned with the absence of supporting rationale for the Board's pronouncement, reversed the Board's decision. *Landmark International Trucks v. NLRB*, 699 F.2d 815 (1983). The court distinguished between situations involving certification or voluntary recognition of a union following an organizational drive and those in which a change in ownership occurred after a union has represented employees for a year or more. The court found that in the former case the employees must be given an opportunity to determine the effectiveness of the union's representation free of any attempts to decertify or otherwise change the relationship. However, the court rationalized that in the latter case, although the relationship between employees and the employer is new, the relationship between the employees and the union is one of longstanding, in which the employees have had the opportunity to determine their union's effectiveness. Consequently, the court concluded, the parties do not need to have a protected period to bargain. Without explaining why, the Board accepted the court's decision and thereafter, in *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985), expressly overruled its earlier decision in *Landmark* and adopted the Sixth Circuit's holdings.⁴

³ Two other cases cited *Southern Moldings*. In *Precision Carpet, Inc.*, 223 NLRB 329, 341 (1976), the issue was whether the predecessor's contract bound the successor and barred rival union petitions. In *B. C. Hawk Chevrolet*, 226 NLRB 527, 529 (1976), the issue was whether, assuming arguendo the inapplicability of recognition and contract bar rules in successorship cases where the predecessor's contract previously had expired, the presumption of ongoing majority status had been rebutted.

⁴ Our dissenting colleagues' assertion that the Supreme Court and several circuit courts have endorsed the conclusion reached in *Harley-Davidson* is simply incorrect. In *Fall River Dyeing Corp. v. NLRB*, 482

B. Application of Recognition Bar Principles

On further reflection, we have concluded that, although the basic premise the Sixth Circuit followed in *Landmark* is correct—that employees in an initial recognition situation must be given a reasonable opportunity to determine the effectiveness of the union's representation, free of any attempts to challenge its majority status—the subsequent conclusion that employees in a successorship situation do not have these same concerns is faulty.

In establishing the recognition bar doctrine, the Board acknowledged that the beginning of a new relationship between a union and an employer was a period of uncertainty for the parties and for the employees. The parties needed to be given the opportunity to learn how to deal with each other in a productive fashion and the employees needed to determine if their union could effectively represent them. In order to give the parties a fair chance to work out this new relationship, without either precipitous interference for anxious employees or attacks by rivals, the parties were given a reasonable period to bargain during which their newly established relationship could not be challenged. If that period elapsed and the parties had not yet reached agreement on a collective-bargaining agreement, the union's majority status was rebuttably presumed to continue. This rule sought to balance the Board's sometimes conflicting goals of maintaining labor stability, and of protecting the employees' right to choose their own representative.

The circumstances in which the recognition bar rules apply are in some respects different from those of a successorship. As stated in *Southern Moldings*, a successor technically stands in the shoes of a predecessor with respect to recognition of the incumbent union; thus, although the employer is new to the bargaining relationship, the union already has a collective-bargaining track record with the employees. But these differences are, in our view, outweighed by the similarities between the two situations.

In both initial recognition and successorship situations, the employer has incurred a recognitional obligation by a voluntary act, either by extending recognition to a union after ascertaining demonstrated majority support or by hiring a sufficient number of a predecessor's employees

U.S. 27 fn. 9 (1987), the Supreme Court simply cited *Harley-Davidson* in a footnote, in the course of noting that there had been no finding that Fall River Dyeing entertained a good-faith doubt of the union's majority status. Similarly, in all the post-*Harley Davidson* circuit court cases cited by our dissenting colleagues, in which the courts referred to the principle that a successor employer can withdraw recognition at any time if it has a good-faith doubt of continuing majority status, the courts were merely reciting the state of Board law at the time. See, e.g., *NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280, 1288 (4th Cir. 1995); *Textron, Inc. v. NLRB*, 965 F.2d 141, 148 (7th Cir. 1992); *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448, 1454 (10th Cir. 1990); *Asseo v. Centro Medico Del Turabo*, 900 F.2d 445, 452 (1st Cir. 1990); and *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 630 (9th Cir. 1983). Only the Sixth Circuit, in *Landmark International Trucks*, supra, has passed on the issue we address today.

to constitute a majority and thereby incurring a bargaining obligation as set out in *NLRB v. Burns Security Services*.⁵ In both situations, because the employer and the union are embarking on a new relationship, all the issues are likely to be open. Thus, bargaining in both situations is likely to present a greater challenge than bargaining between partners in an established relationship who are negotiating a new contract after having lived under an earlier contract or contracts so that only selected issues are likely to be on the table.

Moreover, as in the case of voluntary recognition following an initial campaign, parties in a successorship relationship are in a stressful transitional period. Although in many cases the employees may have had adequate time to determine whether the incumbent union was effective in representing them in negotiations with the predecessor employer, they have not had the opportunity to learn if the incumbent will be effective with the successor. The employees may fear that the successor employer will not want the union or would give them a better deal without it. This is particularly true if the employer has exercised its prerogative to set initial terms and conditions of employment that differ from those that employees have enjoyed pursuant to the union's collective-bargaining relationship with the predecessor.⁶ With mergers and acquisitions commonplace, and with publicized downsizings, restructurings, and facility closings accompanying them, employees' concern over the security of their continued employment and working conditions is understandably increased in the course of any change in ownership. Thus, although at the time of transition there may be no indication that the employees had become dissatisfied with their union, anxiety about their status under the successor may lead to employee disaffection before the union has had the opportunity to demonstrate its continued effectiveness.

Furthermore, the successor may be reluctant to commit itself wholeheartedly to bargain for a collective-bargaining agreement with the incumbent union when at any time following the recognition, the union's majority status may be attacked. A reasonable period free of outside distractions will permit the parties to attempt to bring their new relationship to fruition, i.e., to engage in the process of collective bargaining. Contrary to the suggestion of our dissenting colleagues, this concept of "less than wholehearted" bargaining, and the need to provide safeguards against it, is not foreign to our jurisprudence; in fact, it has been recognized by the Supreme Court. See *Ray Brooks v. NLRB*, 348 U.S. 96, 100 (1954):

⁵ 406 U.S. 272 (1972).

⁶ Pursuant to *NLRB v. Burns Security Services*, supra at 292–296, an ordinary successor—i.e., one that does not make it "perfectly clear" that it intends to retain its predecessor's employees—may unilaterally set the initial terms and conditions of employment prior to its hiring of the predecessor's employees.

It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.

See also *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) ("[the presumptions of majority support] remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees").

In *Fall River Dyeing Corp. v. NLRB*, supra, the Supreme Court recognized that presumptions of majority support enable a union embarking on a new bargaining relationship with an employer to "concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified." These presumptions, the court said, further the "overriding policy goal of the NLRA": industrial peace. *Id.* at 38. In the successorship context, the Court further found, "[t]he rationale behind the presumptions is particularly pertinent." *Id.* at 39. As the Court explained (*id.* at 39–40, footnotes omitted):

During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

The position of the employees also supports the application of the presumptions in the successorship situation. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. With-

out the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

C. Adoption of Successor Bar Rule

Because the rationale for providing a presumption of majority support to a union embarking on a new relationship is, for the reasons explained by the Court, "particularly pertinent" in successorship situations, we see no reason in law or logic why a bargaining representative's status once the successor's duty to recognize it attaches should not be given at least as much protection as is given to a representative's status following the extension of voluntary recognition after ascertaining demonstrated majority support.⁷ We therefore overrule *Southern Moldings*. We hold that once a successor's obligation to recognize an incumbent union has attached (where the successor has not adopted the predecessor's contract), the union is entitled to a reasonable period of bargaining without challenge to its majority status through a decertification effort, an employer petition, or a rival petition.⁸ In doing so, we see no reason to distinguish between those situations in which the predecessor had no current contract with the incumbent at the time of the successorship and one in which there was an existing contract which the successor chose not to assume.

Understandably, the historical use of the term "recognition bar" has come to mean situations arising from vol-

untary recognition based on an employer's good-faith acceptance of a union's demonstrated showing of majority status. In that context, an employer's recognition is voluntary since it may refuse to offer recognition and instead demand that an election be held. By contrast, in the successorship situation, the employer's recognition is voluntary only to the extent that it chooses to hire its predecessor's employees represented by the incumbent union as the majority of its work force. Once an employer has made that choice, the incumbent union's majority status is presumed by operation of law. Thus, the use of the term "recognition bar" may not be the best choice of term in this context. To avoid confusion, henceforth we will employ the term "successor bar" to describe the preclusion of petitions challenging the union's majority status for a reasonable period after a successor employer's obligation to recognize an incumbent union is triggered.

Our dissenting colleagues contend that the adoption of a successor bar rule will "handcuff" the employees in their selection of a bargaining representative if they become dissatisfied with the incumbent union. "Of paramount importance to us," they state, "is the employees' exercise of their Section 7 right to select a union representative of their own choice or to have no union represent them at all." Employee freedom of choice is, of course, a bedrock principle of the statute. Equally so, however, and wholly ignored by the dissenters, are the goals of "promoting sound and stable" labor-management relations (sec. 201) by "encouraging the practice and procedure of collective bargaining" (Sec. 1).⁹ "When those goals conflict, the Board's job is to strike a sensible balance between them." *Stanley Spencer v. NLRB*, 712 F.2d 539, 566 (D.C. Cir. 1984).

Throughout its doctrinal history, the Board has repeatedly balanced these sometimes competing policies. For example, under the Board's contract-bar rules, where an employer and a union have entered into a collective-bargaining agreement, the employees are precluded from selecting an alternative bargaining representative during its term. An irrebuttable presumption of continuing majority status is applied during that period.¹⁰ As with the

⁷ The primary issue decided in *Fall River Dyeing* was whether a successor employer's obligation to bargain with the union that had represented the predecessor's employees was limited to situations in which the union in question had been certified only recently before the transition. The Court agreed with the Board that the obligation was not thus limited. Even if a union's majority status at the time of transition is based on the rebuttable presumption that arises 1 year after the initial certification, its majority status and the accompanying bargaining obligation will apply despite the change in employers if the work force includes a majority of the predecessor's employees. The Court's description of the presumption as rebuttable was neither necessary to the Court's ultimate decision nor surprising but was simply a reflection of Board law at the time. The issue in the present case, whether the successor's recognition should result in an irrebuttable rather than a rebuttable presumption of majority status for a reasonable period of time, was not presented in *Fall River Dyeing*. Thus, neither the Board nor the Court had any occasion to consider whether the policies of the Act might be better effectuated by providing a protected period for bargaining after a *Burns* successor's bargaining obligation is triggered.

⁸ In the successorship situation, the successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor. See *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040 (1989). Thus, because the employer's obligation to recognize the union commences at that time, as soon as those two events have occurred, the bar to the processing of a petition or to any other challenge to the union's majority status begins, whether or not the employer has actually extended recognition to the union as of that time.

⁹ "[I]mportant policy considerations . . . underlie the National Labor Relations Act as a whole. The Board's general obligation under the Act is to promote two goals: (1) employees' freedom of choice in deciding whether they want to engage in collective bargaining and whom they wish to represent them; and (2) the maintenance of established, stable bargaining relationships." *Stanley Spencer v. NLRB*, 712 F.2d 539, 566 (D.C. Cir. 1984).

¹⁰ To assure employees a free choice of representative at reasonable intervals, the Board has held that a contract having a fixed term of more than 3 years operates as a bar for as much of its term as does not exceed 3 years. *General Cable Corp.*, 139 NLRB 1123 (1962). A significant exception is made where the party challenging the contract is either the employer or the contracting union. In those cases, the contract continues as a bar for its entire term. *Montgomery Ward & Co.*, 137 NLRB 346, 348-349 (1962). The Board stated that the contract-bar rules should not be interpreted so as to permit the contracting parties to take

successor bar rule we adopt today, the contract-bar rule is intended to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they so choose. “The Board’s contract bar rule is designed in recognition of the importance of preserving stability in collective bargaining agreements.” *NLRB v. Circle A & W Products*, 647 F.2d 924, 926 (9th Cir. 1981). (“Where the objectives of contract stability and adequate employee representation conflict, the Board must exercise its discretion to reach an appropriate balance, but it must give explicit recognition to both sides of this balance.”)¹¹

A similar example of the Board’s balancing of competing goals is the 1-year irrebuttable presumption of majority status following a union’s certification. Early on employers challenged the Board’s 1-year rule, attempting to vindicate the rights of their employees to select a bargaining representative. They made arguments like those the dissenters rely on today. In rejecting those claims, the Supreme Court stated: “The underlying purpose of this statute is industrial peace. To allow employers to rely on employees’ rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.” *Ray Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

Like the contract-bar and 1-year certification rules, the successor bar rule we adopt today is “based not so much on an absolute certainty that the union’s majority status will not erode . . . as on a particular policy decision.” *Fall River Dyeing*, supra at 38.

The overriding policy of the NLRA is “industrial peace.” *Brooks v. NLRB*, 348 U.S. at 103. The presumptions of majority support further this policy by “promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees.” . . . In essence, they enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. See *Brooks v. NLRB*, 348 U.S. at 100. . . . The upshot of the presumptions is to

permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace. [Id. at 38–39.]

Further, these presumptions of majority status “address our fickle nature by . . . remov[ing] any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support.” *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996), citing *Fall River Dyeing*, supra at 38. The Court’s reasoning supports our holding today.

In adopting this successor-bar rule, we have “exercised our discretion to reach an appropriate balance” between competing policies, giving “explicit recognition to both sides of the balance.” *Circle A & W Products*, supra at 926. We take seriously the Act’s command to respect the free choice of employees as well as to promote stability in collective-bargaining relationships. But, we reject the position that a successor employer may challenge the majority status of its employees’ designated representative once its duty to recognize that union has attached. “The Board is . . . entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union. . . . There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees’ organizational freedom.” *Auciello Iron Works, Inc.*, supra at 790.

In our view, the current *Southern Moldings* rule too easily abets “our fickle nature” and tempts reluctant successor employers indefinitely to postpone performance of their statutory obligation. Contrary to our dissenting colleagues’ contention, the rule we announce today is not intended to provide “extra protection to the incumbent union in a successor bargaining situation.” Rather, it is intended to protect the newly established bargaining relationship and the previously expressed majority choice, taking into account that the stresses of the organizational transition may have shaken some of the support the union previously enjoyed. The rule simply gives substance to the principle that “a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944). “A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out.” *Brooks v. NLRB*, 348 U.S. at 100.

We believe that this successor bar better effectuates a successor’s legally imposed obligation to carry out the predecessor’s bargaining responsibilities than does *Southern Moldings*.¹² Accordingly, it better carries out

advantage of whatever benefits may accrue from the contract “with the knowledge that they have an option to avoid their contractual obligations and commitments through the device of a petition to the Board for an election.” Id. Similar reasoning clearly applies here. A successor employer that has decided to take advantage of the benefits of its predecessor’s trained work force should not be permitted to avoid its bargaining obligations through the device of a petition to the Board for an election.

¹¹ Like the rule we announce today, the contract-bar rule “does not find its source in the express language of the statute, nor is it judicially compelled. Rather, the Board has formulated the rule and thus has the principal discretion to waive or apply it in order to effectuate its policy underpinning.” *NLRB v. Circle A & W Products*, supra at 926.

¹² In this case, had the predecessor continued in operation, the employees would not have had the ability, despite any possible dissatisfaction with “the union’s current officers, or the agreement the union

“the object of the National Labor Relations Act” (*Aucello Iron Works*, 517 U.S. at 785), namely “industrial peace and stability, fostered by collective bargaining agreements providing for the orderly resolution of labor disputes between workers and employers.” *Id.*

Contrary to the dissent’s suggestion, the successor rule we announce today does not wreak injustice on employees who may wish to substitute for the particular union some other bargaining agent or arrangement. The rule extends for a “reasonable period,” not in perpetuity. It is intended neither to give the incumbent union an unfair advantage nor to fix a permanent bargaining relationship requiring the employer to bargain with a designated union forever, without regard to new situations that may develop. After a reasonable period has elapsed, the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations that might make appropriate changed bargaining relationships. *Franks Bros.*, *supra* at 705.

In determining whether a reasonable period has elapsed prior to the filing of a petition, the Board looks to the length of time as well as what has been accomplished in the bargaining. There is no specific cutoff; each case is determined on its own facts. See *Ford Center for the Performing Arts*, 328 NLRB No. 1 (1999). In this case the successor Employer-Petitioner recognized the incumbent Union on January 23, 1995. Thereafter, the parties held three bargaining sessions over a 3-month period. On the day a fourth session was initially scheduled, the Employer-Petitioner filed the instant petition. The Regional Director did not address the issue of a reasonable time for bargaining, and the record does not show what the parties accomplished in their negotiations. We therefore remand this case to the Regional Director to determine whether a reasonable period for bargaining had elapsed at the time the petition herein was filed and to take further appropriate action.

ORDER

The Regional Director’s Decision and Direction of Election, to the extent that it is based on *Southern Moldings*, is reversed. The case is remanded to the Regional Director to determine whether a reasonable period for bargaining had elapsed at the time the instant petition was filed and to take further appropriate action.

negotiated, or how it administers the contract, conducts meetings, or handles employee inquiries” (see dissent, 329 NLRB slip. op. at 9), to displace the union in favor of a new representative prior to the expiration of the collective-bargaining agreement on January 7, 1997. The same would be true had the Employer chosen to adopt the predecessor’s collective-bargaining agreement with the Union—the employees would be bound to the Union that they had previously chosen to represent their interests and to negotiate a contract on their behalf, despite the change in management and a resulting potential change in employee attitudes toward the union.

MEMBERS HURTGEN AND BRAME, dissenting.

Today, our colleagues start back down a path that previously led to a precedential dead end. They revive a doctrine introduced by the Board in 1981,¹ explicitly rejected by the court of appeals in 1983,² and retracted by the Board in 1985.³ It is also inconsistent with a Supreme Court decision in 1987.⁴ We decline to join our colleagues’ ill-advised journey because the doctrine they impose seriously infringes on employees’ Section 7 rights to engage in or refrain from engaging in union activity.

The Board has long presumed that a collective-bargaining representative’s majority status continues in the absence of some contrary evidence.⁵ In *NLRB v. Burns Security Services*,⁶ the Supreme Court approved the Board’s extension of this presumption to a successor employer, so that a successor employer which hires a majority of its employees from an organized predecessor employer must recognize and bargain with the collective-bargaining representative of the employees of the predecessor employer. Until today that presumption of union majority status in the successorship setting was rebuttable, so that an employee could file a decertification petition or an employer could file an election petition, or, under proper circumstances, the employer could withdraw recognition from the union. The Board majority now makes this presumption irrebuttable regardless of the support for the collective-bargaining representative in the old unit or the wishes of the majority of the employees in the new unit.

This new rule adopted by our colleagues has both representation and unfair labor practice facets. In its representation form, it holds that, until a reasonable period for bargaining has elapsed, the Board will not entertain an election petition where a successor employer recognizes the incumbent union but does not adopt an existing contract. This conflicts with our decision in *Southern Moldings, Inc.*,⁷ which held otherwise, and which our colleagues would overrule. They call this doctrine a “successor bar,” to distinguish it from the Board’s traditional “recognition bar.”⁸

In its unfair labor practice form, the “successor bar” rule establishes a presumption which forbids the successor employer from withdrawing recognition, regardless

¹ *Landmark International Trucks*, 257 NLRB 1375 (1981).

² *Landmark International Trucks v. NLRB*, 699 F.2d 815 (6th Cir. 1983).

³ *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985).

⁴ *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41 fn. 8 (1987).

⁵ See *Terrell Machine Co.*, 173 NLRB 1480, 1480–1481 (1969), *enfd.* 427 F.2d 1088 (4th Cir. 1970); *Bartenders Assn. of Pocatello*, 213 NLRB 651 (1974).

⁶ 406 U.S. 272 (1972).

⁷ 219 NLRB 119 (1975).

⁸ Under the recognition bar rule, when an employer voluntarily and lawfully recognizes a union in an initial organizing context, an election petition may not be filed for a “reasonable period of time.” See *Sound Contractors Assn.*, 162 NLRB 364 (1966).

of the facts. Thus, the majority impliedly, but necessarily, reverses *Harley-Davidson Transportation Co.*,⁹ which held that a successor employer, unlike an employer which voluntarily recognizes a majority representative in an initial organizing context, may, without bargaining for a reasonable period of time, withdraw recognition from an incumbent union if it “can show that the union had in fact lost its majority status at the time of the refusal to bargain or that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support.” *Id.*

Unlike our colleagues, we do not believe that an otherwise timely petition challenging the majority status of an incumbent union following its recognition by a successor employer should be barred, nor do we think such an employer should be precluded from withdrawing recognition before a contract is agreed upon, if based on the traditional test for withdrawal, it appears that a majority of the successor’s employee complement no longer support the incumbent union. Of paramount importance to us is the employees’ exercise of their Section 7 right to select a union representative of their own choice or to have no union represent them at all. Imposition of a “successor bar” defeats this goal and runs counter to the purposes and policies of the Act.

I.

The relevant facts of the instant case were stipulated by the parties. For several years prior to December 1994, Local 50, Service Employees International Union, AFL-CIO, CLC, represented the service and maintenance employees of a nursing home operated by Windemere Manor, Inc., in Florissant, Missouri. Windemere and the Union had a 3-year collective-bargaining agreement, effective January 7, 1994, through January 7, 1997. On December 1, 1994, the Employer purchased the assets of Windemere, took over the nursing home operations without a hiatus, and retained a majority of Windemere’s employees.

By letter dated December 6, 1994, the Union requested recognition based on its status as the certified bargaining representative of the former Windemere employees now working for the Employer. On January 23, 1995, the Employer, as a successor employer, recognized the Union as the exclusive bargaining representative of its service and maintenance employees. Rather than assume the contract between Windemere and the Union, the Employer instead began negotiations with the Union for a new contract.¹⁰ To this end, the parties held three bar-

gaining sessions and on April 28, 1995, the Employer filed an RM petition. No contract had been reached.

Relying on *Southern Moldings*, the Regional Director found no merit in the Union’s contention that the petition should be barred. The Region conducted a secret-ballot election on July 7, 1995, and impounded the ballots. The Union filed a timely request for review and seeks, *inter alia*, the reconsideration of the *Southern Moldings* policy.

II.

In the successorship cases prior to *Burns Security Services*, the Board consistently held that the successor employers had the duty of bargaining with their predecessors’ unions if the successors decided to maintain generally the same business and to hire a majority of their employees from the predecessors.¹¹ In *Southern Moldings*, *supra*, the unanimous panel of former Board Members Murphy, Fanning, and Penello declined to impose a recognition bar¹² on a successor and held that a successor employer’s recognition of an incumbent union, in the absence of an effective contract between them, does not bar a decertification petition seeking an election among the employees of the successor employer. In reaching this conclusion, the Board held that “the successor in effect stands in the shoes of its predecessor vis-a-vis the Union (sans an existing contract),” and the union is not entitled to greater rights than it had with the predecessor. 219 NLRB 119. Indeed, the Board determined, “it may even have less [rights] since a successor is not required to accept a predecessor’s union contract.” *Id.* The Board expressly rejected the application of *Keller Plastics Eastern*¹³ to the successorship setting. It held that although *Keller* required a reasonable period for bargaining between a union and an employer that voluntarily recognized it, “[t]hat rule relates to the initial organization of an employer’s employees and does not apply where, as here, an alleged successor-employer has continued to accept an incumbent union as the representative of its employees.” *Id.* at 120.

Six years later in *Landmark International Trucks*, 257 NLRB 1375 (1981), a different three-member Board panel disregarded the precedent in *Southern Moldings* when it found that the respondent successor employer unlawfully withdrew recognition and refused to bargain approximately 3 weeks after having voluntarily recognized the incumbent union.¹⁴ “The Board appear[ed] to have held in [*Landmark*] that regardless of how long the union has been certified, a successor which ‘voluntarily’ recognizes the union may not withdraw recognition for a reasonable time, regardless of the fact that it may have

⁹ *Supra* at fn. 3.

¹⁰ As observed by the Court in *Fall River Dyeing Corp.*, *supra* at 40, *NLRB v. Burns Security Services*, *supra*, held that “although the successor has an obligation to bargain with the union, it ‘is ordinarily free to set initial terms on which it will hire the employees of a predecessor,’ and it is not bound by the substantive provisions of the predecessor’s collective-bargaining agreement.” [Citations omitted.]

¹¹ See cases cited in *Burns*, 406 U.S. at 284.

¹² *Supra* at fn. 8.

¹³ 157 NLRB 583 (1966).

¹⁴ Indeed, there is no indication in the judge’s or Board’s *Landmark* decisions that *Southern Moldings*, or the principle it established, was considered.

reasonable, good faith doubts about the continuing majority status of the union.”¹⁵

The United States Court of Appeals for the Sixth Circuit denied enforcement of the Board’s ill-founded decision in *Landmark*.¹⁶ The court initially pointed out that the Board’s case support for its *Landmark* decision was misplaced because

The cases cited by the Board were ones where a union was recently recognized by a settlement agreement on the basis of a card majority. Under these circumstances this court has held that an employer must bargain for a reasonable time without regard to the union’s majority status. . . . Such cases involve truly voluntary recognition during an organizing campaign, and have no application to cases where a successor employer is required by law to recognize a union with which its predecessor had a collective bargaining agreement.¹⁷

The court observed that “[t]here is no reason to treat a change in ownership of the employer as the equivalent of a certification or voluntary recognition of a union following an organizing drive. . . . While the relationship between employees and employer is a new one, the relationship between employees and union is one of long standing.”¹⁸ The court concluded that recognition by a successor employer “carries with it no irrebuttable presumption of continued majority status” of the incumbent union for any period of time, reasonable or not.¹⁹

In *Harley-Davidson*,²⁰ the Board returned to its earlier rule that when a successor employer recognizes an incumbent union that has been certified for a year or more, the union enjoys a rebuttable presumption of majority status only.²¹ The Board retracted the approach taken in its *Landmark* decision and explicitly endorsed the Sixth Circuit’s reasons for denying enforcement of that decision. The Board agreed with the court that there was no reason to treat a change of ownership as equivalent to voluntary recognition following an organizing drive.²² Indeed, the Board expressly adopted the key distinction recognized by the court between initial recognition and

successorship situations. Whereas the former is a voluntary act, the Board found that “a successor employer’s obligation to bargain with the representative of its predecessor’s employees arises by operation of law and cannot be truly voluntary.”²³

Until today, the Board had not veered from its position taken 14 years ago in *Harley-Davidson*. Nor have the courts challenged the soundness of that Board decision. Rather, the Supreme Court and the Fourth, Sixth, and Seventh Circuits have each cited the *Harley-Davidson* decision, with approval.²⁴

III.

Our colleagues reject, in part, *Harley-Davidson* and assert several reasons for overturning *Southern Moldings* and for instituting a new “successor bar” rule to provide extra protection to the incumbent union in a successor bargaining situation. They contend that the parties in a successor bargaining situation will likely be faced with the prospect of having to resolve many open issues and that such challenges equal or exceed those encountered by the employer and the union in an initial voluntary recognition situation where the Board imposes a recognition bar. Our colleagues also assert that the unit employees must have a protected period to determine the effectiveness of the incumbent union’s representation because the change in the identity of the employer generates a stressful transition period that may itself promote employee disaffection with the union. They further suggest that if such protection is not provided, then the successor employer “may be reluctant to commit itself wholeheartedly to bargain” with the incumbent union if the union’s majority status can be questioned early in the negotiation process. Finally, our colleagues attempt to use certain portions of the Supreme Court’s decision in *Fall River Dyeing Corp. v. NLRB*, supra, to support their abandonment of the *Southern Moldings* policy. None of these arguments justifies extending the recognition bar rule to

²³ Id. We disagree with the majority’s statement that the Board merely accepted the Sixth Circuit’s *Landmark* decision without explanation. On the contrary, the Board made clear in *Harley-Davidson* that it was reaffirming the pre-*Landmark* principle that successors were free to withdraw recognition at any time following recognition where they could show actual loss of majority support or a good-faith doubt of continued majority status. *Barrington Plaza & Tragniew*, 185 NLRB 962, 963 (1970), enf. denied on other grounds sub nom. *NLRB v. Tragniew*, 470 F.2d 669 (9th Cir. 1972).

²⁴ See, e.g., *Fall River Dyeing Corp. v. NLRB*, supra at 41 fn. 8; *NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280, 1288 (4th Cir. 1995); *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1288 (6th Cir. 1989); and *Textron, Inc. v. NLRB*, 965 F.2d 141, 148 (7th Cir. 1992).

Similarly, following *Harley-Davidson* and the Sixth Circuit’s *Landmark* decision, other courts of appeal have applied the principle that successor employers can withdraw recognition from the predecessor’s union upon evidence of loss of majority support or a good-faith doubt. See, e.g., *Asseo v. Centro Medico Del Turabo*, 900 F.2d 445, 452 (1st Cir. 1990); *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 630 (9th Cir. 1983); and *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448, 1454 (10th Cir. 1990).

¹⁵ *Landmark International Trucks*, supra at 818.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Supra at fn. 3.

²¹ Indeed, prior to *Harley-Davidson*, courts frequently stated that successor employers did not have to bargain if they entertained a good-faith doubt of the unions’ majority status, or if such majority status had been lost. See, e.g., *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 (2d Cir. 1977); *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 481 (3d Cir. 1980); *NLRB v. Valleydale Packers, Inc.*, 402 F.2d 768, 769 (5th Cir. 1968), cert. denied 396 U.S. 825 (1969); *NLRB v. Wayne Convalescent Center*, 465 F.2d 1039, 1043 (6th Cir. 1972); and *Zim’s Foodliner v. NLRB*, 495 F.2d 1131, 1139 (7th Cir. 1974), cert. denied 419 U.S. 838 (1974). (“The rebuttable presumption does not prevent the employer from petitioning the Board for a new election.”)

²² 273 NLRB at 1532.

the successor employer and denying the employees their Section 7 right to change or reject their collective-bargaining representative.

IV.

We do not disagree that contract issues in the initial voluntary recognition and successorship situations may be similar in some respects. There is an important difference, however. In the initial voluntary recognition situation, the union must develop two sets of working relationships with the employer and the unit employees. By contrast, while the incumbent union has previously represented a majority of the employees and while it may not necessarily be familiar with the new employer, its overall knowledge of the operations and the specific facility may exceed that of the new owners. Thus, it can build rapidly on its past experience in handling workplace issues that particularly concern these unit employees. The incumbent union thus has a track record familiar to the unit employees. In short, our colleagues want to protect the incumbent from the desires of those individuals who have firsthand knowledge of, and experience with, the union's ability, attentiveness, and performance. Collective bargaining, however, should flow from employee choice and not drive it, and to impose this new irrebuttable presumption expressly trumps employee choice.

For example, the employees may dislike the union's current officers or the agreement the union negotiated, or how it administers the contract, conducts meetings, or handle employee inquiries; or they may consider the dues level excessive. Under our colleagues' "successor bar" rule, unit employees must stay with the incumbent union even if they prefer to use another labor organization to deal with this successor employer. Indeed, the "successor bar" rule handcuffs the employees in their selection of a bargaining representative and may serve to protect a union in a successorship situation from a fully informed decertification petition. The majority decision is best described by Judge Sentelle as the "belief that those of the working class cannot be trusted to reject deceit on their own, and that, therefore, their benevolent big brother must watch after them."²⁵ Thus, because the employees might be mistaken, the majority would deprive them of their Section 7 freedom of choice and regardless of whether their dissatisfaction turns on the identity of the employer²⁶ or the performance of the collective-bargaining representative.²⁷

²⁵ *Extel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 979 (D.C. Cir. 1998) (Sentelle, J., concurring).

²⁶ Employees' choice of a union representative often may be strongly influenced by their perception of the employer. A change of ownership, accordingly, may alter employee sentiments with respect to representation. However, if the successor employer were legally obligated to bargain with the predecessor's union for a reasonable period of time, "the union would be installed in a virtually unassailable position in a period in which there is some reason to doubt continued majority sup-

Our colleagues also fear that the successor employer will bargain "less than wholeheartedly" unless the Board imposes a recognition bar in the successorship situation. To this we have three responses. First, our colleagues assume that only the employer and never the employees want a collective-bargaining representative change. Second, "less than wholehearted" bargaining is a concept without foundation under the Act. Either bargaining is in good faith or it is not. Finally, they assume that the General Counsel and the Board would be powerless if the employer did not bargain in good faith. An employer with a bargaining obligation, successor or not, by law must bargain to impasse with the union in good faith to reach agreement under Section 8(d) and Section 8(a)(5) of the Act.²⁸ Bargaining cannot be cut off at the successor's whim but only when the successor can show by objective considerations that the incumbent union no longer represents a majority, or that it has a good-faith doubt based on objective factors concerning the union's majority status.²⁹ With their "successor bar" rule, our colleagues want to go beyond this basic protection against bad-faith bargaining and give the incumbent union an unfair advantage. We decline to do so. The incumbent union already possesses a full arsenal of economic and legal weapons to change the employer's mind if it becomes reluctant to bargain.

Our colleagues additionally rely on *Fall River Dyeing Corp. v. NLRB*, supra, where the Supreme Court held that a successor employer is obligated to recognize an incumbent union based on a presumption of majority status flowing from its prior representation of the unit employees while working for the predecessor employer. They contend that the Court's description of the presumption as rebuttable was neither necessary to the

port." Note, *The Bargaining Obligation of Successor Employers*, 88 Harv. L. Rev. 759, 764 (1975).

²⁷ Also, if the successor and the incumbent union execute a collective-bargaining agreement, it could postpone the exercise of the employees' free choice for an additional 3 years under the Board's contract-bar rule. *General Cable Corp.*, 139 NLRB 1123 (1962).

²⁸ See, e.g., *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). ("Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain . . . with respect to 'wages, hours, and other terms and conditions of employment.'")

²⁹ See *Fall River*, supra at 37-38, 41 fn. 8; *Williams Enterprises, Inc.*, supra at 1288; and *Harley-Davidson*, supra.

Here, the Employer apparently had unchallenged evidence in support of its RM petition. The Union did not file unfair labor practice charges alleging misconduct that would justify blocking or dismissing the petition. Consequently, we can accept the petition in this case as the result of an uncoerced expression on the part of the employees that they wished to exercise their Sec. 7 rights to change or reject the incumbent union. Under the Board's *U.S. Gypsum* rule, when an employer petitions the Board for an election as a means of questioning the continued majority status of a previously certified incumbent union, it must show the union's claim for continued recognition and "must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification." *U.S. Gypsum Co.*, 157 NLRB 652, 656 (1966).

Court's ultimate decision nor surprising but was simply a reflection of the Board law at the time. They point out that the issue in the present case, whether the incumbent union's recognition should result in an irrebuttable rather than a rebuttable presumption of majority status for a reasonable period of time following recognition by the successor employer, was not presented in *Fall River*.

The Court's focus in *Fall River* was on whether a successor employer should be obligated to recognize and bargain with an incumbent union that had only a presumption of majority support, or whether such obligation should be limited to situations where the union had recently been certified. While it explicitly said nothing about how long recognition would last and under what conditions, the Court expressed concern about subjecting employers to such a bargaining obligation and whether the presumption of majority status would impair employee free choice.³⁰ In deciding to require a successor employer to recognize and bargain with the incumbent union, the fact that the employer could remove the obligation by showing that the union no longer represented an employee majority was an important factor considered by the Court. Indeed, the Court, citing with approval the Board's decision in *Harley-Davidson*,³¹ observed that

If, during negotiations, a successor questions a union's continuing majority status, the successor "may lawfully withdraw from negotiation *at any time* following recognition if it can show that the union had in fact lost its majority status at the time of the refusal to bargain or that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support." [Emphasis added.] 482 U.S. at 41 fn. 8.

³⁰ *Fall River Dyeing Corp. v. NLRB*, supra at 38–41.

³¹ Our colleagues dispute that the Supreme Court in *Fall River* endorsed the Board's decision in *Harley-Davidson*. But, we note that the classic treatise on the National Labor Relations Act explicitly interpreted the Court's decision in *Fall River* as having "endorsed the *Harley-Davidson* ruling." See I Patrick Hardin, *The Developing Labor Law*, 792 (3d. ed. 1992).

The Court further emphasized the rebuttable nature of the presumption of majority status in the successorship situation by highlighting that the successor "employer, unsure of a union's continued majority support, may petition the Board for another election," citing the Court's decision in *NLRB v. Financial Institution Employees*.³² Id. Thus, we find no support for our colleagues' "successor bar" rule based on *Fall River*.

Finally, the majority argues that extant Board law should be reversed and court law disregarded to require successor bargaining "for a reasonable period," on the theory that, had the predecessor employer still been in operation, it would have been required to comply with the 1994–1997 contract. We find no merit in this argument. Under law, successors (except in limited circumstances not applicable here) have no legal obligation to assume the collective-bargaining agreements between the union and predecessor employer. Therefore, it is faulty reasoning to impose a heightened bargaining obligation on a successor premised on a legal obligation it clearly does not have.

Further, the rule announced by the majority places even greater restrictions on employees and the successor employers. Thus, in successorship situations where there is no contract in effect at the time that the successor assumes the predecessor's operation, our colleagues would reject any question concerning representation and obligate the successor to bargain with the union for a reasonable period of time, regardless of employee wishes. This is a particularly anomalous result given that the same employees could file a decertification petition and the predecessor would be free to file an RM petition or withdraw recognition.

For all these reasons, we would continue to follow *Southern Moldings* and *Harley-Davidson* and would direct the opening and the counting of the impounded election ballots.

³² 475 U.S. 192, 198 (1986).